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McDermott, Will & Emery  
600 13th Street, NW  
Washington, DC 20005-3096

In re Application of :  
BURN et al.. :  
Application No. 09/857,346 :  
PCT No.: PCT/AU99/01079 : DECISION  
Int. Filing Date: 02 December 1999 :  
Priority Date: 03 December 1998 :  
For: Control Of Flowering :

This is a decision in response to the "Response To Decision On Request For Reconsideration" filed on 30 March 2003, a copy of which was filed on 20 August 2004.

### DISCUSSION

On 17 March 2004, a Decision was mailed to counsel in response to the papers filed on 01 October 2003. The Decision indicated that

"Counsel argues that the declaration of 22 August 2002 was acceptable because "the fifth inventor had actually signed on a Declaration sheet by himself." Review of the record reveals that neither of the two declaration filed on 22 August 2002 was signed by the fifth-named inventor, Pascual Perez." The instant "Request for Reconsideration" is accompanied by, *inter alia*, copies of 3 Declarations (including a Declaration signed by Pascual Perez) and by a copy of a return postcard receipt itemizing a "Declaration/Power of Attorney" and stamped as received by "OIPE" on "AUG 22 2002." Inspection of the application file reveals the presence of two Declaration documents originally filed on 22 August 2002, neither of which was signed by Pascual Perez. MPEP § 513 explains that "where the records of the Office (e.g., the file of the application) contain any document(s) or fee(s) corresponding to the contents of the correspondence at issue, the Office will rely upon its official record of the contents of such correspondence in the absence of convincing evidence (e.g., a postcard receipt under MPEP § 503 containing specific itemization of the document(s) or fee(s) purported to have been filed with the correspondence at issue) that the Office received and misplaced any document(s) or fee(s) that is not among the official records of the Office." The official records of the Office fail to suggest the presence of an oath or declaration signed by Pascual Perez among the papers filed on 22 August 2002. Hence, the burden is upon petitioner to provide convincing evidence that such an oath or declaration was in fact filed on that date. Since the postcard receipt of record does not provide a "specific itemization" of three separate Declaration documents per MPEP 513, counsel has not provided a sufficient showing to overcome the presumption that the official records of the Office are correct. As such, the copy of the Declaration signed by Pascual Perez will be accorded its actual date of filing, 06 March 2003.

Counsel retorts that

"You will note that, on July 22, 2002 Counsel received via facsimile from the client the executed Declarations/Power of Attorney for all the inventors except Mr. Perez,

(the receipt of these documents on July 22, 2002 was within the second month extended period for response, copy enclosed). However, the documents were not filed at that time, but held until August 22, 2002 to provide Mr. Perez the opportunity to provide his declaration... The undersigned attorney's file contains a copy of all three Declarations with the Response to the Missing Parts and other documents that were filed therewith. There is no reason to believe that the Perez declaration was not filed with the original Response to the Missing Requirements as every effort was made to obtain the signature of Mr. Perez prior to filing a complete Response to the Notice to File Missing Requirements. It can only be presumed that the Declaration was misplaced after the deposit of the Response at the U.S. Patent and Trademark Office."

This argument and the supporting evidence are insufficient to establish that all three declaration documents, including the declaration executed by Perez, were *actually filed* with the USPTO. Rather, the evidence of record merely tends to suggest that counsel *intended* to file the Perez declaration. This intent is shown by the description of the decision to delay filing the declarations until counsel had possession of the Perez declaration. Nonetheless, this evidence of intent is not sufficient to overcome the official records of the Office which show what papers *actually were filed*. In the absence of substantial additional evidence on the point of what actually was filed, it would not be appropriate to grant the requested relief at this time.

#### DECISION

For the reasons explained *supra*, counsel's request is **REFUSED**, without prejudice.

If reconsideration on the merits of this petition is desired, a proper response must be filed within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time may be obtained under 37 CFR 1.136(a).

Please direct any further correspondence with respect to this matter to the Assistant Commissioner for Patents, Mail Stop PCT, Alexandria, VA 22313-1450, and address the contents of the letter to the attention of the PCT Legal Office.

This application is being forwarded to the National Stage Processing Branch for further processing. Its date under 35 U.S.C. 371 (c)(1), (2) and (4) is **06 March 2003**.



Leonard Smith  
PCT Legal Examiner  
PCT Legal Office



George M. Dombroske  
PCT Legal Examiner  
PCT Legal Office  
Tel: (703) 308-6721  
(571) 272-3283  
Fax: (703) 308-6459  
(571) 273-0459